

10-2026-cv
State of New York v. Solvent Chemical Co. et al.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: September 19, 2011 Decided: December 19, 2011)

Docket Nos. 10-2026-cv(L), 10-2166(XAP), 10-2383-cv(XAP)

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STATE OF NEW YORK,
Plaintiff,

-v.-

SOLVENT CHEMICAL COMPANY, INC.,
Defendant-Third Party
Plaintiff-Appellant-Cross
Appellee,

ICC INDUSTRIES, INC.,
Defendant-Third Party
Plaintiff-Cross Appellee,

-v.-

OLIN CORPORATION,
Third Party Defendant-
Counterclaimant-Appellee-
Cross Appellant,

E.I. DU PONT DE NEMOURS & COMPANY,
Third Party Defendant-
Appellee-Cross Appellant.

- - - - -x

Before: JACOBS, Chief Judge, HALL and LYNCH,

Circuit Judges.

Plaintiff sought contribution under the Comprehensive Environmental Response and Compensation Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, for both past and future costs of cleaning up industrial pollution. The United States District Court for the Western District of New York (Curtin, J.) awarded contribution for past cleanup costs but declined to issue a declaratory judgment as to future contribution. For the following reasons, we REVERSE the denial of a declaratory judgment. Numerous other issues raised on appeal are decided in a summary order issued simultaneously with this opinion.

FOR APPELLANT:

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FOR CROSS APPELLEE:

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FOR APPELLEES:

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1 DENNIS JACOBS, Chief Judge:
2

3 This appeal is taken from a judgment of the United
4 States District Court for the Western District of New York
5 (Curtin, J.) that (among other rulings) denied a declaratory
6 judgment of liability for future cleanup costs under the
7 Comprehensive Environmental Response and Compensation Act
8 ("CERCLA"), 42 U.S.C. §§ 9601-9675. Plaintiff Solvent
9 Chemical Company, Inc. ("Solvent") sued two adjoining
10 property owners, E.I. du Pont de Nemours & Co. ("DuPont")
11 and Olin Corporation ("Olin"), seeking contribution for
12 costs that Solvent had incurred and continues to incur
13 cleaning up hazardous waste pursuant to a consent decree
14 with the State of New York. The district court awarded
15 Solvent contribution for past costs, but declined to issue a
16 declaratory judgment. The court declined to declare
17 *liability* chiefly because the *allocation* of future costs
18 would be premature. New York v. Solvent Chemical Co., 685
19 F. Supp. 2d 357, 455-56 (W.D.N.Y. 2010).

20 The other issues raised on appeal are decided in a
21 summary order issued simultaneously with this opinion. In
22 this opinion, we conclude that a declaratory judgment should
23 be issued in favor of Solvent, and to that extent we reverse
24 the judgment.

1

2 **BACKGROUND**

3 At varying times over the past century, Solvent,
4 DuPont, and Olin owned adjoining facilities in the City of
5 Niagara Falls, New York. DuPont's plant on the banks of the
6 Niagara River manufactured various chlorinated aliphatic
7 compounds. Solvent and Olin owned and operated adjacent
8 sites immediately inland of DuPont's. A portion of Olin's
9 property (known as the Olin Hot Spot) is bounded by the
10 Solvent property on one side and on the other side by Gill
11 Creek, which thence continues across the DuPont site into
12 the Niagara River. Olin also owns property on the other
13 side of Gill Creek, at which it manufactured the pesticide
14 benzene hexachloride ("BHC") and produced as byproducts
15 various chlorinated benzenes. Production of BHC ended in
16 1956 when Olin's plant exploded. In the mid 1970s,
17 chlorinated benzenes and other chemicals were manufactured
18 at the Solvent Site.

19 In 1983, New York sued Solvent and others for
20 environmental contamination at the Solvent Site. In 1996,
21 the New York Department of Environmental Conservation
22 ("DEC") issued a Record of Decision ("ROD") requiring
23 Solvent to undertake remedial action at both the Solvent

1 Site and the Olin Hot Spot as a result of chlorinated
2 benzene contamination. Solvent entered into a consent
3 decree obligating it to perform the remedies specified in
4 the ROD in settlement of New York's CERCLA claims.
5 Solvent's cleanup operations began in 1999 and continue to
6 this day.

7 In 1998, Solvent filed a fifth amended third-party
8 complaint adding Olin as a party and seeking contribution
9 for its response costs incurred under its consent decree
10 with New York on the basis of chlorinated benzenes
11 originating from Olin's BHC plant. In 2001, Solvent
12 commenced a suit against DuPont for costs incurred under its
13 consent decree with New York that resulted from the
14 migration of chlorinated aliphatics from the adjoining
15 DuPont Facility onto the Solvent Site and Olin Hot Spot.
16 Solvent incurred additional cleanup costs as a result of the
17 aliphatic contamination.

18 Solvent's claims against DuPont and Olin were
19 consolidated and tried without a jury over 19 days in late
20 2007. For administrative convenience, the parties agreed
21 that all response costs incurred through June 30, 2007 would
22 be treated as past costs, and that all costs thereafter
23 would be the subject of Solvent's prayer for a declaratory

1 judgment that DuPont and Olin were liable for future cleanup
2 costs. Expert testimony conflicted about the source of the
3 various chemicals that had to be cleaned up, and about the
4 groundwater flow that carried the pollutants among
5 properties. The court noted the "wide disparity in the
6 parties' interpretation of the vast amounts of data
7 generated over the course of decades of remedial
8 investigations and clean-up activities" and deplored the
9 parties' "inability to reach any workable consensus as to
10 the reasonable scientific conclusions to be drawn" from the
11 evidence collected. Solvent, 685 F. Supp. 2d at 435-36,
12 451, 452.

13 The judgment (entered May 14, 2010) awarded Solvent
14 contribution from DuPont in the amount of \$2,050,371 and
15 from Olin in the amount of \$462,288, for costs incurred
16 through June 30, 2007. It denied Solvent's request that
17 DuPont and Olin be declared liable for future cleanup costs
18 (allocation to be determined after costs are incurred). The
19 separate summary order issued today affirms the ruling that
20 Solvent is entitled to past response costs by DuPont and
21 Olin under CERCLA section 113(f)(3)(B), 42 U.S.C. §
22 9613(f)(3)(B), but vacates the allocation of response costs
23 in part, and remands for reallocation.

1

2 **DISCUSSION**

3 We review a district court's refusal to grant a
4 declaratory judgment for abuse of discretion. Dow Jones &
5 Co., Inc. v. Harrods Ltd., 346 F.3d 357, 359 (2d Cir. 2003).
6

7 **I**

8 As to certain claims, CERCLA section 113(g)(2) requires
9 a district court to "enter a declaratory judgment on
10 liability for response costs or damages that will be binding
11 on any subsequent action or actions to recover further
12 response costs or damages." 42 U.S.C. § 9613(g)(2). Oddly,
13 the wording of section 113(g)(2) limits its application to
14 "[a]n initial action for recovery of the costs referred to
15 in section 9607 [CERCLA § 107]," i.e., not section 113(f).
16 Id. Solvent contends nevertheless that section 113(g)(2)
17 also applies to contribution actions under section 113(f).
18 The First and Sixth Circuits agree. See GenCorp, Inc. v.
19 Olin Corp., 390 F.3d 433, 450 (6th Cir. 2004); United States
20 v. Davis, 261 F.3d 1, 46-47 (1st Cir. 2001). Other circuits
21 have also issued declaratory judgments for future costs
22 under section 113(f), but have been less clear about the
23 source of that authority. See Boeing Co. v. Cascade Corp.,

1 207 F.3d 1177, 1191-92 (9th Cir. 2000) (upholding grant of
2 declaratory judgment in contribution case after recognizing
3 that section 113(g)(2) did not prohibit declaratory relief
4 for section 113(f) claims); Tosco Corp. v. Koch Indus., 216
5 F.3d 886, 897 (10th Cir. 2000) (finding that a declaratory
6 judgment in connection with a section 113(f) suit was an
7 appropriate remedy where future response costs were likely
8 to be incurred). And in one case under section 113(f), this
9 Circuit has recognized that the "proper remedy for future
10 response costs is not a present lump-sum payment of
11 anticipated expenses but instead a declaratory judgment
12 award dividing future response costs among responsible
13 parties." Goodrich Corp. v. Town of Middlebury, 311 F.3d
14 154, 175 (2d Cir. 2002) (internal quotation marks omitted).

15 We need not decide whether section 113(g)(2)'s
16 mandatory wording (on entry of a declaratory judgment for
17 future liability) applies to § 113(f) contribution actions,
18 because the factors considered by a district court under the
19 Declaratory Judgment Act, 28 U.S.C. § 2201(a), are
20 sufficient to require a declaratory judgment in this case.
21 Id. at 359.

II

The district court ruled that "final judgment regarding the allocation of future costs to any party other than Solvent would be premature." Solvent, 685 F. Supp. 2d at 455-56. The district court listed its reasons for declining to issue a declaratory judgment: (1) the "principal negative environmental impact of the chlorinated benzene contamination" from Solvent's plant; (2) the failure of testifying experts to provide the court with a basis for interpreting the scientific data presented; (3) the DEC's pronouncement that its "future determinations with regard to the effectiveness of the groundwater remedy at the Site will be made based on data pertaining to hydraulic control of the contaminants of concern identified in the Solvent ROD--chlorinated benzenes--without regard to control of chlorinated aliphatics"; (4) the "extent to which the continued presence of chlorinated aliphatics in the pumped groundwater might be deemed responsible for any incidental increase in treatment costs has already been taken into consideration by the court in discounting DuPont's allocable share of past costs"; and (5) the DEC's continued review of

1 other remedies to account for chlorinated aliphatics in the
2 groundwater. Id. at 455.

4 III

5 The reasons given by the district court might justify a
6 refusal to *allocate* cleanup responsibility; none of them,
7 however, supports a refusal to grant a declaratory judgment
8 as to *liability* itself. The district court has already
9 decided that Olin and DuPont were liable for contribution as
10 to historical losses. Save for the possibility that the DEC
11 might in the future impose different remedies to clean up
12 the chlorinated aliphatics, none of the factors identified
13 by the court distinguishes between past and future cleanup.
14 That is to say, the factors do not explain why DuPont and
15 Olin should pay for cleanup costs through June 30, 2007, but
16 not for those incurred on July 1, 2007 and thereafter. And
17 should the DEC take action in the future regarding
18 chlorinated aliphatics, the district court can consider that
19 fact in allocating costs down the road. Even concern over
20 the future role of chlorinated aliphatics in the ongoing
21 cleanup would not affect Olin's responsibility to contribute
22 to cleanup costs based on its discharge of chlorinated
23 benzenes.

1 When faced with a request for a declaratory judgment
2 pursuant to the Declaratory Judgment Act, 28 U.S.C.
3 § 2201(a), a district court must inquire:

4 [1] whether the judgment will serve a useful purpose in
5 clarifying or settling the legal issues involved;
6 . . . [2] whether a judgment would finalize the
7 controversy and offer relief from uncertainty[;] . . .
8 [3] whether the proposed remedy is being used merely
9 for procedural fencing or a race to res judicata; [4]
10 whether the use of a declaratory judgment would
11 increase friction between sovereign legal systems or
12 improperly encroach on the domain of a state or foreign
13 court; and [5] whether there is a better or more
14 effective remedy.

15
16 Dow Jones & Co., 346 F.3d at 359-60 (internal quotation
17 marks omitted). These factors require a district court to
18 issue a declaratory judgment in this case. A declaratory
19 judgment would "serve a useful purpose" here for at least
20 two reasons.

21 First, there is a short statute of limitations for a
22 CERCLA contribution claim. See 42 U.S.C. § 9613(g)(3)
23 (three year statute of limitations from entry of judgment in
24 cost recovery action, entry of administrative order, or
25 judicially approved settlement). Solvent entered into the
26 consent decree with New York on April 2, 1997, and could not
27 commence a new suit for contribution after April 2, 2000.¹

¹ In the summary order issued in conjunction with this opinion, we conclude that DuPont waived its statute of limitations defense to Solvent's contribution claim by

1 Since the limitations period is triggered by approval of the
2 consent decree, which may signal only the beginning of
3 cleanup, declaratory judgments will often be necessary to
4 ensure an equitable apportionment of cleanup costs that (as
5 is common) are incurred over many years. That is the case
6 here: Though the consent decree between New York and Solvent
7 was completed in April 1997, construction of the cleanup
8 operation did not commence until 1999 and the statute of
9 limitations expired soon after, in April 2000.

10 Second, the "costs and time involved in relitigating
11 issues as complex as these where new costs are incurred
12 would be massive and wasteful." Boeing, 207 F.3d at 1191.
13 As is typical, the CERCLA claims and defenses below were
14 complex, and entailed years of litigation, weeks of trial,
15 and thousands of pages of briefing. A declaratory judgment
16 with respect to liability saves litigants and courts
17 substantial time and money, leaving for the future only the
18 need to fix the amount of contribution and affording the
19 court flexibility with respect to the time and manner for
20 doing so. Once the uncertainties regarding ongoing response
21 costs have been resolved, a declaratory judgment allows the
22 parties to invoke the jurisdiction of the district court

failing to raise it until five years into litigation.

1 pursuant to 28 U.S.C. § 2202 and obtain "further relief" in
2 the form of an order establishing the precise costs that
3 each party will bear.

4 Accordingly, we conclude that: the judgment would
5 "serve a useful purpose in . . . settling the legal issues
6 involved," the judgment is not being used for procedural
7 gamesmanship or a race to res judicata, it will not increase
8 friction between sovereign legal systems, and there is no
9 "better or more effective remedy"--in fact there would be no
10 remedy for Solvent at all without declaratory relief. Dow
11 Jones & Co., 346 F.3d at 359-60. It does not matter that a
12 declaratory judgment of liability alone will not "finalize
13 the controversy and offer relief from [all] uncertainty."
14 Id.

16 CONCLUSION

17 For the foregoing reasons, we REVERSE the judgment of
18 the district court insofar as it declines to issue a
19 declaratory judgment in favor of Solvent against DuPont and
20 Olin.